Supreme Court, U.S.
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No. 00-955

IN THE

Supreme Court of the United States

FREDERICK A. HURLEY AND CHRISTINE A. HURLEY,
Petitioners,

v.

MOTOR COACH INDUSTRIES, INC.
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITIONERS' REPLY BRIEF

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4 pp

QUESTION PRESENTED

Whether the Seventh Circuit has misinterpreted this Court's opinion in the "so-called" "no-airbag" case - *Geier -v- American Honda Co.*, 120 S. Ct. 1913 (2000) and whether this Court should therefore grant Certiorari to correct the opinion of the Court and to resolve conflicts between the various Circuit Courts of Appeals and at least one state court of "last resort".

JURISDICTION

This Court has jurisdiction in accordance with the statement set forth in our Petition. At the time of the filing of the Petition Mr. Howard Paperner was a member of this Court and, in fact, moved for the admission of Thomas C. DeVoto. The Petition was accepted as timely and docketed. Mr. DeVoto was advised by the Clerk's office that "so long as there was at least one attorney of record" who was a member of the Court that the matter would be accepted and docketed. Furthermore, due to the fact that his petition for admission was pending and about to be ruled upon that the Petition would be accepted listing Mr. DeVoto as "Counsel of Record" because under Rule 9.2 Mr. DeVoto could later move to listed as"attorney of record" and that, therefore, no change was necessary.

REPLY ARGUMENT

The vehicle in question is a Bus and that does make all the difference. Sometimes it is difficult to see the forest for the trees. Apparently this is what happened to both Judge Wood and to a lesser extent to Petitioners in their Application for rehearing and in the Petition filed herein.

Two things have brought this oversight to light. First, the Respondent's brief in opposition points out that (sic) petitioners did not distinguish between the **car** in *Geier* and the **Bus** in *Hurley*. Respondent goes on to state that since FMVSS 208 applies to both cars and buses therefore, ipso facto, *Geier* is controlling as to its analysis of "no-airbag" cases.

Secondly, both the Eighth and Ninth Circuit Courts of Appeals have published opinions discussing this Court's ruling in *Geier* and pointed out that the only reason that implied pre- emption barred *Geier's* theory of recovery was the Government's position that it would frustrate the purpose of the statute and the secretary's regulations that called for a gradual "phase-in" of the use of airbags and other passive restraint systems. This "phase-in" was the only "obstacle to the accomplishments and execution of the full purposes and objectives of Congress".[1] (Brief of the United States in *Geier* Appellants Appendix 93-96) Therefore in the absence

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[1] See our Supplemental Brief filed contemporaneously with this Reply.

Harris -v- Great Dane Trailers, Inc. 234 F. 3d 398 (8th Circuit, Dec. 11, 2000)

Leipart, -v- Guardian Industries, Inc., 234 F.3d 1063 (9th Circuit. Dec. 12, 2000)

of the "phase- in" there can be no conflict under *Geier*. Sections 4.4.2.1 and 4.4.2.2 are the subsections of Standard 208 that apply to the bus in question. There is no phase-in or even a requirement to use airbags under the applicable standard. The phase-in under standard 4 applies only to cars - not buses. Standards 4.4.2.1 and 4.4.2.2 allow the manufacture to chose the passive restraints that will allow it to meet the performance standards set forth in sections 5 & 6 of the Standard 208. The evidence in this case is clear that they did not meet those standards, i.e a defective design. Moreover, those standards merely set a minimum or a floor and therefore there can be no pre-emption under the Act and under this Court's ruling in *Geier* as a matter of established law. The Seventh Circuit opinion is simply wrong and this Court should accept the Petition and immediately remand the case for a decision consistent with this Court's opinion in *Geier*.

CONCLUSION

WHEREFORE, for the reasons previously asserted in their Petition and for the reason set forth herein the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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February, 2001